

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



HELEN R. BAILEY,)	
)	
Charging Party,)	Case No. LA-CE-3967
)	
v.)	PERB Decision No. 1375
)	
POMONA UNIFIED SCHOOL DISTRICT,)	February 28, 2000
)	
Respondent.)	
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Appearance; Parker, Covert & Chidester by Cathie L. Fields,
Attorney, for Pomona Unified School District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case comes before the Public
Employment Relations Board (PERB or Board) on exceptions by
the Pomona Unified School District (District) to an
administrative law judge's (ALJ) proposed decision. The unfair
practice charge alleged that the District violated section
3543.5(a) of the Educational Employment Relations Act (EERA)¹

¹EERA is codified at Government Code section 3540, et seq.
EERA section 3543.5 states, in pertinent part:

It shall be unlawful for a public school
employer to do any of the following:

- (a.) Impose or threaten to impose reprisals
on employees, to discriminate or threaten to
discriminate against employees, or otherwise
to interfere with, restrain, or coerce
employees because of their exercise of rights
guaranteed by this chapter. For purposes of
this subdivision, "employee" includes an
applicant for employment or reemployment.

by retaliating against substitute teacher, Helen R. Bailey (Bailey) for her protected activity.

After reviewing the entire record, including the unfair practice charge, the proposed decision, and the District's exceptions,² the Board affirms the proposed decision, in part, and reverses it, in part, in accordance with the following discussion.

BACKGROUND

Bailey was employed by the District from November 14, 1990 to June 30, 1998. As a substitute teacher, she was not a member of the bargaining unit represented by the Associated Pomona Teachers (APT), nor was she a member of any other recognized bargaining unit.

During most of her employment with the District, Bailey held a series of emergency 30-day substitute teaching permits, which authorized her to substitute for not more than 30 days for any one teacher during a school year. For the period of May 1, 1997 to January 31, 1998, she held an emergency long-term multiple-subject teaching permit, which authorized her to teach multiple-subject-matter self-contained classes. After the expiration of her long-term permit, she again held a 30-day permit, for the term of February 1, 1998 to March 1, 1999.

²The District's request for oral argument was denied on February 22, 2000.

The complaint alleges three separate adverse actions taken against Bailey by the District. Each of those alleged adverse actions shall be described in turn.

Refusal of Contract

The complaint alleges, in part, that on or about October 30, 1997, the District refused to offer Bailey a contract for a permanent position. In her unfair practice charge, Bailey alleged that her principal, offered her a contract on September 3, 1997, but that the District later refused to give her the position and claimed that it had been filled.

The factual background includes the following events. On August 1, 1997, the District posted a notice of vacancy for "Math/Science Teachers (Investigations)" at Fremont Middle School, where Bailey had previously taught as a substitute. The notice listed as a minimum qualification "Appropriate California Teaching Credential authorizing instruction in the above grade and/or subject." On August 18, 1997, Bailey filed a request for the position. She was interviewed on September 2, 1997, and was ranked as the top candidate by a panel that included middle school principal, Gloria R. Marquez (Marquez).

The panel's ranking of candidates was then sent to the District's personnel office, which referred it to the District's credentialing expert, Sharon Mhoon (Mhoon). Mhoon determined that for the math/science position, a teacher with an emergency credential would need to have 18 semester units (or 27 quarter

units) in either math or science. She reviewed Bailey's transcript and determined that Bailey did not qualify in this regard.³

After learning of Mhoon's determination, the District's personnel office informed Bailey and Marquez that Bailey did not qualify. Marquez credibly testified she never offered Bailey a contract. In fact, Marquez testified she never offered contracts to anyone, and she was always very careful about even discussing contracts with candidates, in case the candidate did not qualify.

Due to a lack of qualified candidates, however, Bailey did teach the math/science classes for a time, but only as a long-term substitute. On October 30, 1997, the District sent Bailey a form letter stating, in part:

I want to thank you for applying for the
[math/science] position referenced above.

This position is closed and I appreciate your
time and effort in applying for this vacancy
and encourage you to apply again for other
positions that may become available in the
future.

The letter was stamped with the signature of District certificated personnel director, William Graham (Graham).

Bailey was confused by the letter. She understood the statement that the position was "closed" to mean that the position was filled by someone else, which she knew was not true. Graham testified, however, that "closed" simply meant the time to

³Bailey was one of 27 candidates Mhoon determined did not qualify for various positions that year. Mhoon did not know Bailey and did not take into account any conduct by Bailey.

apply was over, not that the position was necessarily filled. It appears the October 30, 1997 letter was a general purpose form letter to tell candidates they did not get a position.

Bailey called the personnel office, and Graham himself spoke to her, explaining why she did not get the math/science position. Their conversation was pleasant, and Graham thought the issue was resolved.

The issue was not resolved, however, because Bailey believed she could qualify for the math/science position if she enrolled in appropriate classes. In the winter and spring of 1998, Bailey did enroll in classes at the California State Polytechnic University, and she made several efforts to persuade the District to give her the position.

Among other efforts, Bailey wrote letters to Graham and Mhoon. In her letter to Graham, dated February 25, 1998, she characterized the October 30, 1997 letter, to her as "a very strange letter falsely claiming that the position for which I applied had been filled." She stated, in part, "I thought an error had been made, and that someone would soon contact me with corrections and a contract, [but] it's been four months since that letter." In her letter to Mhoon, dated March 22, 1998, she asked, "Again, why haven't I been given the contract that was offered to me in September, 1997?" She also stated that "the APT representative will be asked to file a complaint to get some answers."

Bailey did seek help from APT, although she was not a member of the bargaining unit it represented, and APT did make inquiries on her behalf. Graham explained to both the APT director and the APT president that Bailey did not qualify for the math/science position.

On March 30, 1998, Graham sent Bailey herself a letter about the math/science position stating, in part:

Interviews were held for this position in September of 1997, in which you were a participant, and selections were recommended to Personnel by the Principal. Subsequent to this position, at least two other Math/Science positions were available at Fremont and still have not been filled due to the lack of qualified applicants.

Applicants chosen for positions by Pomona Unified School District must qualify at the time the position is offered. My information indicates that you were not selected for a position because you do not hold the appropriate credential. No applicant is placed in a position contingent upon completing coursework.

In your letter, you stated that you enrolled in coursework at Cal Poly which you feel will qualify you for Math/Science positions in the future. Therefore, I would suggest that once you complete the coursework, apply for vacant positions for which you qualify.

Graham closed the letter by telling Bailey to make an appointment if she wanted to discuss the matter further.

Bailey did make appointments to talk with Graham, but both Bailey and Graham cancelled appointments. Instead, Bailey talked on the telephone with Graham's assistant Cassandra Yep (Yep), who had no information to add to Graham's March 30, 1998 letter.

Refusal of Summer School Employment

The complaint also alleges that on or about May 27, 1998, the District took adverse action against Bailey by refusing to offer her summer school employment. The evidence showed Bailey applied to teach summer school on April 1, 1998. The District's written policy on staff selection for summer school, however, stated, in part:

Temporary and/or emergency credentialed teachers are **not eligible to teach summer school**. Unless however, all other applicants have been exhausted and the appropriate assistant superintendent and Personnel agree that **no other options** are available, because of the uniqueness of the specific need.
(Emphasis in original.)

Principal Marquez confirmed that this policy was followed at her school.

Bailey's summer school application was filed with the District's personnel office. Graham and his staff reviewed all such applications and sorted out those ones filed by temporary and/or emergency credentialed teachers, including Bailey. All such applications were set aside and were not considered unless there was no one else to fill a unique and specific need. Apparently, there was no unique and specific need that only Bailey could fill.

On May 27, 1998, Graham sent Bailey a letter stating, in part:

The number of applications submitted for summer school employment far exceed the number of available positions. We, therefore, selected those individuals who were highest on the priority list to teach

the 1998 summer school program. Because of this situation, we regret to inform you that you were not selected this year.

This was a general purpose form letter sent to all unsuccessful applicants for summer school employment.

Termination

The complaint also alleges that the District terminated Bailey's employment as a substitute teacher in retaliation for her protected activity. This allegation is based on the following facts.

On June 30, 1998, District certificated personnel director Graham sent Bailey a letter that concluded as follows:

On a number of occasions, to date, you have contacted the Personnel Office demanding appointments, demanding that you be hired, and attempting to compare your situation with others without having all the facts. You have been very rude and argumentative with Mrs. Yep on at least two occasions. You wrote uncomplimentary letters to Mrs. Yep on three occasions and to Mrs. Mhoon on two occasions. I responded to one of your letters regarding why you were not contracted. However, your persistence continued and you telephoned and argued with a number of different employees in the Personnel Office on two or three occasions.

Employees of the Personnel Office have tolerated your outbursts on the telephone, your intimidating letters and your demands to meet with me including the head of the Associated Pomona Teachers.

In summary, I feel that Pomona Unified School District has provided you with every opportunity to be successful. At this point and time, my decision is that your service as a substitute teacher with Pomona Unified School District is no longer in the best interest of the school district.

It is simply too time consuming for everyone to have to continue to tolerate the unprofessionalism you consistently demonstrate.

This letter did, in fact, terminate Bailey's employment by the District.

Two of the letters from Bailey to Yep that Graham apparently cited as "uncomplimentary" dated from 1991. The earliest of these letters, dated October 25, 1991, and referred to a situation in which the District had apparently given apartment manager, Carol Bacon (Bacon) some information about Bailey's employment situation that had led Bacon to deny Bailey's rental application.

In the October 25, 1991 letter, Bailey asserted that the information had been released in violation of her privacy and in violation of law. The letter continued, in part, as follows:

Another issue of grave concern is giving me false and misleading information regarding my employment status, and then telling others the opposite. I am refering [sic] to my being told that my status was inactive, but Ms. Bacon was told I was no longer employed. Yet, after stating in your letter that I was not terminated, you proceeded to say I was rehired rather than reactivated. To be rehired implies firing.

As previously explained, the incidence [sic] with Ms. Bacon has led to a lawsuit, and since I am representing myself in pro per; it is absolutely essential to have all the facts correct so that an innocent person is not falsely accused. Please be assured that if this information was not extremely important, I would have avoided writing this letter at all. Realizing that you appeared hostile and upset when first asked about your conversation with

Ms. Bacon, and that you determine which substitutes will work has caused me great stress and fear of not being allowed to substitute.

Nevertheless, I feel compelled to have the aforementioned issues addressed and corrected if at all possible. If correction is not possible so that the written letter can be submitted for public record, then a subpoena [sic] will be issued to both you and Bea to appear in person.

Yep testified she was "puzzled" by this letter, but she then talked to Bailey and felt the matter was resolved.⁴

The second "uncomplimentary" letter from Bailey to Yep was dated November 30, 1991. Bailey apparently believed the District had not been calling her to work as a substitute teacher (although District records show calls were being placed to her answering machine and not returned). Her November 30, 1991 letter stated, in part:

Therefore, I feel it is safe to assume that, while I have not committed any professional, or qualification wrong. You are not calling me because of a personal grudge stymying [sic] from recent attempts to obtain a basis for contradictory, conflicting, or/and incorrect information as relayed to myself and others. This action is protected by law, and is extended to all individuals, and it is an unfair employment practice to be denied employment for asserting that right.

A formal grievance will be filed in objection to the unfair, unjust actions taken against me without due-process, or an explanation. I will contact the appropriate committees, Boards, and individuals necessary to properly resolve this very serious matter.

⁴The record contains no evidence of Yep or "Bea" having received a subpoena in relation to this incident.

Yep did not testify as to her reaction or response to this letter. Bailey did attempt to file a grievance, but it is not clear what happened.

The record contains only one letter from Bailey to Mhoon, but it was apparently sent twice: first on March 22, 1998, and again on April 2, 1998. The letter stated Mhoon had "ignored all [previous] letters . . . and refused to address the issue." It also stated that "the APT representative will be asked to file a complaint to get some answers." The letter concluded as follows:

I'm really tired of being discriminated against for whatever reasons. I work very hard and do a good job and this negative treatment is causing me much distress and depression and needs to end immediately. This letter is being mailed by certified mail with return signature to ensure receipt. Please reply.

Mhoon testified she probably gave the letter to someone else in the personnel office, because Mhoon herself did not correspond with individual candidates for positions.

The final "uncomplimentary" letter in the record was sent by Bailey to Yep on June 12, 1998. Bailey believed that the District should have allowed her to join the State Teachers' Retirement System (STRS) in 1995 (rather than 1996) and that the District's failure to do so ultimately led to problems with the Internal Revenue Service (IRS). Her June 12, 1998 letter discussed this issue and then brought in some other issues Bailey had raised in the past; it stated, in part, as follows:

The IRS wants detailed information about this situation and I need a letter from you explaining why you told me in 1995 I didn't

qualify for STRS when STRS says subs qualified as of 1991, not in 1996. See the attached letter from the IRS.

I certainly hope that you don't refuse to call me for work, or consider me for long-term and contract positions for filing an IRS complaint as you did when I filed a complaint for discrimination against Afro-American substitutes in 1991. Afterwards I couldn't get much work after working long-term for Karla Duvall's Spanish-speaking kindergarten class at Lexington Elementary in 1991 by special request.

I wasn't given another long-term position until 1995 when Mr. Romero and Mrs. Hogan made a special request for me to take Rob Clark's place from January to June 1995. Even then, Ms. Hogan states that she was told I didn't do long-term assignments, when I had been begging for extra work and long-term assignments. I never told you or anyone else that I didn't want such assignments, but they insisted that I be called anyway.

I knew you were punishing me for filing that complaint and protesting the information about my not passing the CBEST test and wouldn't be working for PUSD anymore was an invasion of privacy when it was given to an apartment manager in 1991.

As you know, Personnel records and test scores are confidential and cannot be released without written consent and that consent wasn't given to you or anyone else. Objection was addressed in what you call my long letters, to no avail.

I also feel that you have been instrumental in preventing me from getting a contract. Remember our telephone conversation where you claimed Mr. Graham wouldn't discuss the contradicting letters and explanations about the contract I was promised, but didn't get this year.

Again, you claimed I didn't qualify, even though I have the same type degree and qualify for the two types of emergency credentials available and held by others who

didn't have classroom experience when offered contracts. I have taped their conversations about such credentials and will present this later.

Any U.S. citizen has the right to complain when they feel they have been discriminated against, or treated unfairly or unequal. Federal laws protects us who do file complaints.

Your prompt response is appreciated. The IRS has a deadline for receipt of this information. I'm notifying them that their request for detailed information has been made to you. I hope you don't ignore this request as you did the phone call.

Yep testified she was "puzzled" by this letter too, so she turned it over to Graham. In the June 30, 1998 termination letter (cited above), Graham responded to the accusations in this letter. There is no evidence that Yep had suggested to Graham that Bailey be terminated.

On July 28, 1998, Bailey filed the instant unfair practice charge.

DISCUSSION

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee engaged in protected activities, the activities were known to the employer, and the employer took adverse action because of the activities. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to the charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School

District (1979) PERB Decision No. 89. (Carlsbad).) According to Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the protected activities (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); the employer's departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or the employer's animosity toward union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to show it would have taken the adverse action regardless of the employee's protected activities. (Novato: Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

As to the first two alleged adverse actions in this case, lengthy analysis seems unnecessary. Even assuming the burden of proof shifted to the District, the preponderance of the evidence shows that Bailey would have been refused a contract for the math/science position regardless of any protected activity,

because the District's credentialing specialist determined that she did not qualify for the position. The allegations that this refusal was retaliatory must, therefore, be dismissed.

The preponderance of the evidence also shows that Bailey would have been refused summer school employment regardless of any protected activity, because the District had a policy against selecting temporary and/or emergency credentialed teachers. The allegations that this refusal was retaliatory must also be dismissed.

As to the final alleged adverse action in this case, however, more analysis is necessary. That final action was Graham's termination of Bailey's employment by the letter of June 30, 1998.

The initial question, under Novato, is whether those activities were protected. It is well established that EERA protects the rights of employees to be represented by an employee organization and to represent themselves individually in their employment relations with a public school employer. (EERA sec. 3543; Pleasant Valley School District (1988) PERB Decision No. 708.) The evidence shows that Bailey exercised both of these rights.

With regard to the math/science position, Bailey contacted APT, and APT contacted Graham. Although APT was not Bailey's exclusive representative, that fact does not render these contacts unprotected. Bailey also represented herself individually, through numerous letters and telephone calls to the

District. These calls and letters generally concerned Bailey's employment relations with the District and are therefore protected under EERA. The question is whether these calls and letters were so "rude," "argumentative," "uncomplimentary" and "intimidating" as to lose their protection.

Speech (including writing) that is related to employer-employee relations loses its protection under EERA only if it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with school activities." (Rancho Santiago Community College District (1986) PERB Decision No. 602 (Rancho Santiago).)

It would be accurate to describe the portions of Bailey's letters quoted above as "uncomplimentary" to the District or its representatives. They certainly expressed Bailey's belief that she had been wronged by the addressees; they also expressed her determination to continue to challenge the perceived wrongs. Read in the overall context, however, we do not find that the letters are so insulting or malicious that they lose their protected status. The language used is forceful but not abusive. They do not threaten the addressees with anything worse than a subpoena, a grievance, or a professional contact with the IRS, all of which are topics that labor relations personnel are likely to encounter at least occasionally in the routine course of business.

On the whole, we find that there is insufficient evidence to show that Bailey's calls and letters caused substantial disruption of or material interference with District operations. (See Rancho Santiago.) In conclusion, Bailey's calls and letters, as well as her contacts with APT, were activities protected by EERA.

Turning to the other elements of the Novato test, it is plain that Graham knew about Bailey's protected conduct. It is also undisputed that termination constitutes an adverse action.

The remaining question in this case, therefore, is whether the District terminated Bailey's employment because of those activities.

Bailey relies on the termination letter as evidence of the District's motive. In examining the letter closely and placing it in the appropriate context, we note that it covers a broad range of topics. The first page and a half of the letter summarizes key points in Bailey's employment history with the District, and largely constitutes an attempt by Personnel Director Graham to clarify facts or respond to accusations. Nothing in this factual recitation/response portion of the letter provides evidence of retaliatory motive.

Starting at the bottom of the second page, Graham presents his own perspective of various communications by Bailey to the District. He describes her as being "rude," "argumentative," and "persistent" in her relations with District employees, and states that certain letters were "uncomplimentary" and "intimidating."

At the end of the letter, Graham concludes by informing Bailey that her service as a substitute teacher with the District is no longer in the best interest of the school district. He states, "It is simply too time consuming for everyone to have to continue to tolerate the unprofessionalism you consistently demonstrate." This portion of the letter contains Graham's personal opinion of Bailey's behavior with regard to his staff, and conveys his professional opinion that, as a result of that behavior, Bailey is no longer an asset to the District. Even if one were to disagree with Graham's opinions, his statement of those views in this letter does not furnish evidence of a nexus between Bailey's protected conduct and Graham's decision to terminate her employment.

It is important to note that, in the entire three-page termination letter, Graham makes only a single passing reference to APT. He states that "Employees of the Personnel Office have tolerated your outbursts . . . , your intimidating letters and your demands to meet with me [and] the head of the [APT]." This is an apparent statement of fact that happens to include APT. Read objectively, the statement places no particular connotation, positive or negative, on the fact that Bailey wished to include APT in a meeting. It is apparent that it is Bailey's demands, letters and "outbursts" that Graham finds objectionable. The letter's passing reference to APT falls far short of furnishing

evidence that Bailey's APT contacts (or her attempts to represent herself) were the District's true motive for terminating her employment.

Our interpretation of the letter, read in the context of the entire series of events, is that it objectively documents the reasons for Graham's decision to terminate Bailey's employment. The letter lists the specific actions which are deemed unacceptable, and it identifies those actions, under the rubric of "unprofessionalism," as the basis for the termination. Placed in context, we do not find that the letter furnishes the requisite evidence of nexus.⁵ Nor do we find any other direct evidence of retaliatory motive.

However, as stated above, in the absence of direct evidence, PERB will consider whether there is circumstantial evidence of unlawful motivation on the part of the employer. (Carlsbad.) Factors that may be considered include: the timing of the adverse action in relation to the protected activity; the employer's disparate treatment of the employee; the employer's

⁵Nor are we willing to second guess Graham's sworn testimony regarding his true purpose in terminating Bailey. He testified that Bailey's contacts with the union, and union representatives' subsequent contacts with Graham, were not reasons for his decision to release Bailey from substitute service. (R.T., Vol. II, p. 74:5-18.) There is nothing in the record that leads us to believe that Graham lied under oath. Furthermore, Bailey offered nothing to contradict Graham's sworn testimony.

We also note that the ALJ, who observed the parties firsthand, concluded that Bailey's testimony, overall, was "not particularly credible," yet he made no such finding with regard to Graham. In light of these facts, we cannot conclude that Graham's testimony was false.

departure from established procedures or standards; the employer's inconsistent or contradictory justifications for its actions; or the employer's animosity toward union activists.⁶

The majority of these factors are not present here. The sole factor that arguably weighs in Bailey's favor, timing of the adverse action in close temporal proximity to her protected activity, is insufficient, standing alone, to demonstrate a discriminatory motive. (Moreland Elementary School District (1982) PERB Decision No. 227.) A second factor must be present, and we find no evidence of any other factor.

Even if one were to assume that Bailey had proven the nexus element, we find that the District has met its burden of proof in showing that it would have taken the adverse action regardless of her protected activities. In addition to the grounds listed in the termination letter, the record contains substantial evidence to support Graham's justification for terminating Bailey's employment. Graham simply decided that it was no longer in the District's best interest to continue to employ Bailey, and Bailey

⁶In fact, Graham's uncontradicted testimony was that he had cordial conversations with the APT representatives, who seemed satisfied with his explanation. (R.T., Vol. II, p. 72:8-27.)

has not established that he acted pursuant to a retaliatory motive.⁷ In conclusion, this unfair practice charge must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-3967 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

⁷See Fall River Joint Unified School District (1998) PERB Decision No. 1259 at pp. 24-25, in which the Board dismissed retaliation allegations because the district met its burden of proof that the adverse action [involuntary transfer based on the "best interest of the program"] was the result of the deterioration of the relationship between the transferred employee and the employer. The Board found that the District would have transferred the employee regardless of the employee's protected activity.